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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 107

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of Judith Marie Hall, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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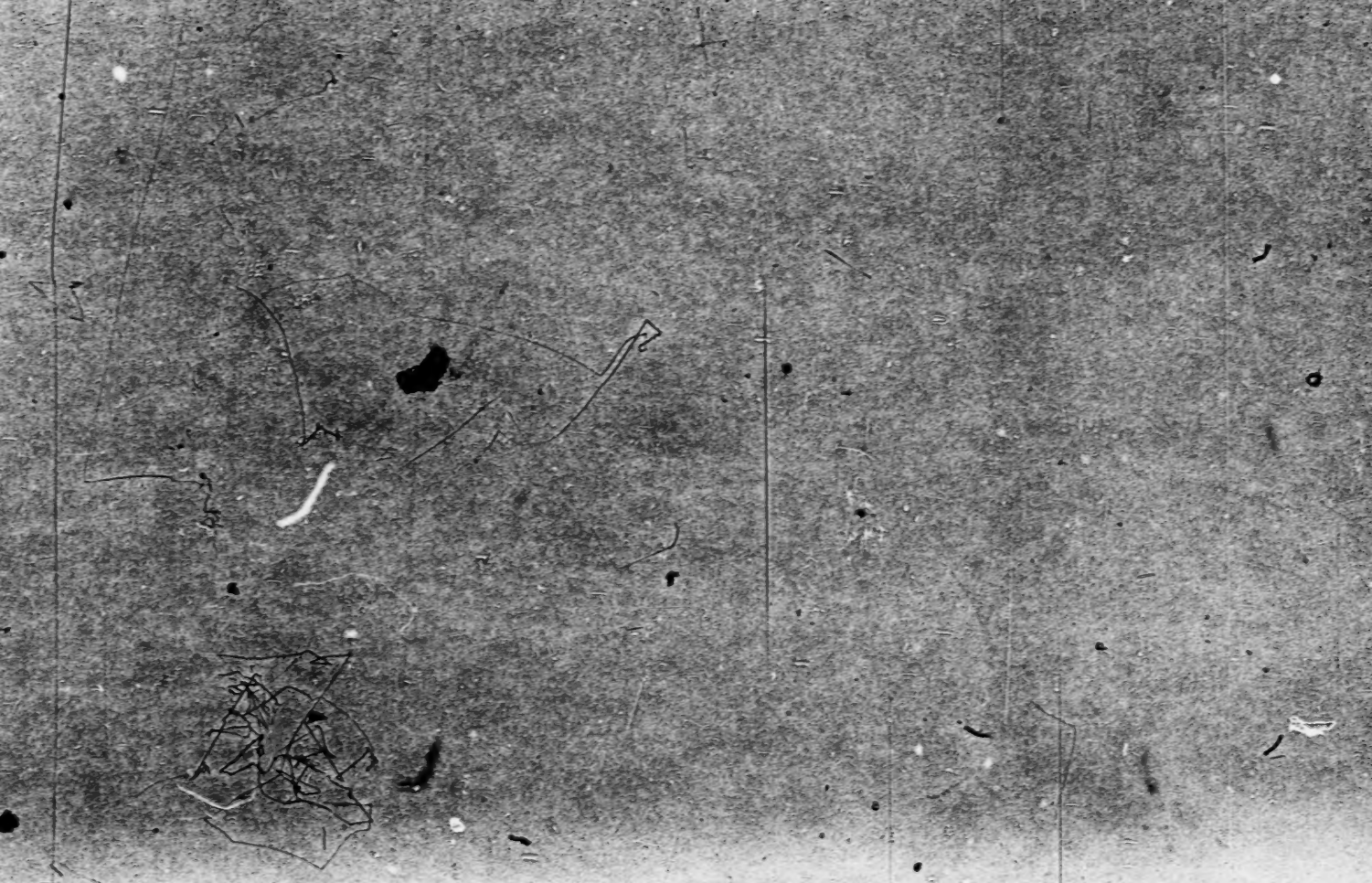

INDEX

	PAGE
Questions Presented	1
New York Statute Involved	2
California Statutes Involved	3
Statement of the Case	6
Summary of Argument	8
Argument:	
I—The Courts below correctly applied New York law, the law of the forum, and in turn, California law, the lex loci delicti, in determining the rights of the parties in this wrongful death action having its situs in California	9
A. The widow's age of majority under California law is the essential consideration in this case	10
B. Rule 17(b) of the Federal Rules of Civil Procedure has no bearing here since the question is not one of capacity but of possession of a cause of action	16
II—The Courts below were clearly correct in following California cases which are squarely in point with respect to the claim of the infant daughter	18
III—No privileges and immunities of petitioners have been violated since they were given reasonable and adequate access to the courts of New York	22
Conclusion	24

AUTHORITIES CITED

Cases:

PAGE

American Surety Company of New York v. *Gainfort*, 219 F. 2d 111 (2 Cir. 1955) . . 9, 10, 15
Arques v. *National Superior Co.*, 67 C. A. 2d 763, 155 P. 2d 643 (1945) 15
Atlantic Coast Line R. R. v. *Phillips*, 332 U. S. 168 (1947) 22
Baldwin v. *Powell*, 294 N. Y. 130, 61 N. E. 2d 412 (1945) 9
Biewend v. *Biewend*, 17 C. 2d 108 (1941) 14
Bowen v. *Kizirian*, 105 Cal. App. 286, 287 Pac. 570 (1930) 20, 21
Bowler v. *Ross*, 213 Cal. 484, 2 P. 2d 817 (1931) 20, 24
Bruton v. *Villoria*, 138 C. A. 2d 642, 292 P. 2d 638 (1956) 13
Canadian Northern Ry. v. *Eggen*, 252 U. S. 553 (1920) 22, 23
Caraway v. *Burns*, 143 C. A. 2d 327, 299 P. 2d 689 (1956) 11, 15
Clyde v. *Gilchrist*, 262 U. S. 94 (1923) 22
Deason v. *Jones*, 7 C. A. 2d 482, 45 P. 2d 1025 (1935) 12
Emery v. *Emery*, 45 C. 2d 421, 289 P. 2d 218 (1955) 12, 18
Erie R. R. v. *Tompkins*, 304 U. S. 64 (1938) . . 9, 24
Flores v. *Brown*, 39 C. 2d 622, 248 P. 2d 922 (1952) 20, 21

PAGE

Forthmann, In re, 118 Cal. App. 332, 5 P. 2d 472 (1931) 3n

Gates v. Wendling Nathan Co., 27 C. A. 2d 307, 81 P. 2d 173 (1938) 19, 20, 21

Gonzales v. Superior Court, 3 C. 2d 280, 44 P. 2d 320 (1935) 3n

Guaranty Trust Co. v. York, 326 U. S. 99 (1945) 9, 16

Haro v. Southern Pac. R. R., 17 C. A. 2d 594, 62 P. 2d 441 (1936) 11, 15, 19, 20, 21

Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U. S. 487 (1941) 9

Klotz v. Angle, 220 N. Y. 347, 116 N. E. 24 (1917) 22

Magee v. McNary, 10 F. R. D. 5 (W. D. Pa. 1950) 16

People v. Fink, 121 Cal. App. 14, 8 P. 2d 493 (1932) 3n

Perkins v. Robertson, 140 C. A. 2d 536, 295 P. 2d 972 (1956) 20, 21

Ragan v. Merchants Transfer Co., 337 U. S. 530 (1949) 17

Sears v. Majors, 104 Cal. App. 60, 285 Pac. 321 (1930) 18, 19, 20, 21

Smith v. Sheplar, 8 C. A. 2d 717, 48 P. 2d 999 (1935) 14

Vance v. Vance, 108 U. S. 514 (1883) 23

West v. American Tel. & Tel. Co., 311 U. S. 223 (1940) 21

Constitution:

PAGE

United States Constitution, Article IV, §2 22

Statutes:

California:

Civil Code, Section 25 .....5, 10, 11, 12, 14, 15

Code of Civil Procedure
Section 312 .....4, 10
Section 335 4
Section 340 .....4, 10
Section 352 .....5, 10, 12, 15
Section 361 ..... 14n
Section 377 .....3, 6, 18, 20, 21

New York:

Civil Practice Act
Section 13 .....2, 9, 22, 23, 24
Sections 201-206 23
Section 236 23

South Carolina Code, Volume 1, §10-104(1) .. 16n

Rules:

Federal Rules of Civil Procedure, Rule 17(b) 2, 8, 16

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Petitioners,

against

TRANSOCEAN AIR LINES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Questions Presented

1. In this diversity of citizenship case, did the federal courts sitting in New York correctly apply New York law and California law to the alleged wrongful death of petitioners' decedent who was killed in an airplane accident in California?

2. Did the lower courts correctly construe California statutes and California decisions in holding

that the widow reached her majority at the age of eighteen years; that California's one year statute of limitations commenced to run at that time and upon expiration of such one year period any cause of action based on decedent's wrongful death was barred to her and her daughter?

3. Is Rule 17(b) of the Federal Rules of Civil Procedure relevant to a determination of the applicable period of the statute of limitations, and, if so, can it be construed in such a manner as to bring about a different result in a federal court from that in a California state court?

4. Does Section 13 of the New York Civil Practice Act provide reasonable access to New York courts where the petitioners had two and a half years in which they could have instituted suit through a guardian *ad litem* prior to being barred by the statute?

New York Statute Involved

CIVIL PRACTICE ACT

"§ 13. Limitation where cause of action arises outside of the state

Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. * * *"

California Statutes Involved

The Code of Civil Procedure of the State of California:[1]

Part 2, Title 3

OF THE PARTIES TO CIVIL ACTIONS

"§ 377. Wrongful death of adults or certain minors; action by personal representatives; death of wrongdoer; damages; consolidation of actions

When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under

[1]The California courts have held that in interpreting sections of their Code of Civil Procedure, title, chapter and section headings should be given effect according to their import to the same extent as though they were included in the body of the law. *Gonzales* v. *Superior Court*, 3 C. 2d 260, 44 P. 2d 320 (1935); *People* v. *Fink*, 121 Cal. App. 14, 8 P. 2d 493 (1932); *In re Forthmann*, 118 Cal. App. 332, 5 P. 2d 472 (1931).

Section 956 of the Civil Code. The respective rights of the heirs in any award shall be determined by the court.* * *"

Part 2. Title 2

Chapter 1

THE TIME OF COMMENCING ACTIONS IN GENERAL

"§ 312. General limitations; special cases

Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

Chapter 3

THE TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY

"§ 335. Periods of limitation

PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

* * * *

§ 340. One year

Within one year:

* * * *

3. Libel, slander, assault, battery, false imprisonment, seduction, wrongful death, forged or raised check, injury to animal by feeder or veterinarian. An action for libel, slander, assault, battery, false imprisonment, seduc-

tion of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act of or neglect of another, * * *"

Chapter 4

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS

"§ 352. Disabilities of minority, insanity, imprisonment, and marriage; effect on limitation period

EXCEPTION, AS TO PERSONS UNDER DISABILITIES. If a person entitled to bring an action, mentioned in Chapter 3 of this Title, be, at the time the cause of action accrued, either:

1. Within the age of majority;

* * * *

—The time of such disability is not a part of the time limited for the commencement of the action."

The California Civil Code:

Part 1

"§ 25. Minors defined; exception of married females over 18; effect of annulment

Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage, or who

has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, or for the purpose of maintaining or defending an action affecting her marital status, the same as if she was 21 years of age.* * *"

Statement of the Case

This action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane owned and operated by the defendant. The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow as guardian *ad litem* of her minor child (R. 2, 8, 9). Jurisdiction of the district court was predicated on diversity of citizenship, the administrator being a citizen of New York, the widow and her minor child being citizens of South Carolina and the defendant being a California corporation (R. 4). The action was predicated upon the Wrongful Death Statute of California, California Code of Civil Procedure, § 377 (R. 6, 7).

Defendant's motion for summary judgment upon the ground that the action was barred by the California statute of limitations was granted by Levet, J., in an opinion and order (R. 33-39, 173 F. Supp. 114) which was entered as a judgment on May 14, 1959. The judgment was unanimously affirmed by the Second Circuit in an opinion by Friendly, J. (R. 42-50, 276 F. 2d 280) entered on March 2, 1960.

For the purposes of this review, the following facts, as found by Judge Levet (R. 34-35), are undisputed:

1. The widow, Marjory M. Hall, was born November 17, 1936.

2. The decedent, Jasper Wallace Hall, was born March 2, 1934.

3. The marriage took place on December 26, 1951, in South Carolina.

4. Judith Marie Hall, the child of this couple, was born December 2, 1952.

5. The death of Jasper Wallace Hall took place on March 20, 1953, in the State of California.

6. The widow reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957.

7. The administrator was appointed on February 18, 1958.

8. The action was commenced in the United States District Court for the Southern District of New York on November 7, 1958.

9. The widow is a resident of Charleston, South Carolina.

Summary of Argument

I. In accepting the borrowed statute of limitations the courts below were required to apply it with all its accouterments including its tolling provisions. Since the statute was tolled only while the widow was "within the age of majority", the courts below properly looked to the California statutes to determine when she reached the age of majority. It could not reasonably have been the intention of the California legislature to leave the definition of "majority" to the laws of the states of non-residents seeking to enforce a California cause of action in a California court and thus extend to a non-resident a longer period within which to bring suit than that extended to its own residents. Moreover, there is no question here with respect to capacity to sue at the time the action was instituted and Rule 17(b) of the Federal Rules of Civil Procedure has no bearing on the instant case.

II. The courts below properly followed the California cases which are squarely in point in barring the action of the infant daughter.

III. All that the "privileges and immunities" clause of the Constitution requires is that nonresidents be given reasonable and adequate access to the courts of New York. The right extended to the widow to enforce her claim by a guardian *ad litem* was reasonably sufficient and adequate.

ARGUMENT

I

The Courts below correctly applied New York law, the law of the forum, and in turn, California law, the lex locus delicti, in determining the rights of the parties in this wrongful death action having its situs in California.

There is no dispute here as to the general principles applicable to this diversity action brought by non-residents of New York upon a cause of action for wrongful death arising in California. Petitioners and respondent are in basic agreement that the lower courts were required to apply the law of New York, including the conflict of laws rules and statute of limitations of that state. *Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938); *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U. S. 487 (1941); *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945). Under the New York conflict of laws rule any substantive right of action which petitioners may have for the alleged wrongful death of their decedent is governed by the laws of California. *Baldwin* v. *Powell*, 294 N. Y. 130, 61 N. E. 2d 412 (1945). Under the borrowing provisions of the New York statute of limitations this action cannot be enforced in the courts of New York if it is barred by the statute of California. New York Civil Practice Act, Section 13. In accepting the borrowed statute of limitations, the New York courts, and the federal courts sitting in New York, will apply it with all its accouterments, including its tolling provisions. *American Surety Company of New York* v. *Gainfort*,

219 F. 2d 111 (2 Cir. 1955). The basic question presented to the lower courts, therefore, as petitioners point out at page 11 of their brief, was whether petitioners would have been barred in California if their suit had been brought there instead of in New York.

A. The widow's age of majority under California law is the essential consideration in this case.

The basic California statutory provision with respect to the time limitations for the commencement of civil actions is clear and unambiguous. Section 312 of the California Code of Civil Procedure expressly provides that civil actions "without exception" can only be commenced within the periods prescribed in that title of that code, unless where, in special cases, "a different limitation is prescribed by statute." Under Section 340(3) of the same Code of Civil Procedure, an action for wrongful death must be commenced within one year from decedent's death, and under Section 352 this one year limitation is tolled if the person entitled to sue is "within the age of majority". Under Section 25 of the California Civil Code, any female who has contracted a lawful marriage and thereafter reaches the age of eighteen years, shall, upon reaching the age of eighteen years, be of the age of majority and be deemed an adult person for the purpose of entering into any "transaction respecting property" the same as if she was twenty-one years of age.

The California courts have held that the phrase, "transaction respecting property", as contained in Section 25 of the California Civil Code, includes the bringing of an action for wrongful death and that a

widow over the age of eighteen years is under no disability to bring such an action. In *Haro* v. *Southern Pac. R. R.*, 17 C. A. 2d 594, 62 P. 2d 441 (1936), the widow was over the age of eighteen years at the time of the death of her husband and under twenty-one years of age when the action was instituted. The court referred to Section 25 of the Civil Code and, after citing several cases construing the words "transaction" and "property", concluded (p. 597):

> "It would seem, therefore, that the phrase 'transaction respecting property' includes within its definition the bringing of an action by a widow for the wrongful death of her husband. That being true, Mrs. Haro was under no disability that would prevent her from suing for the damages suffered from the wrongful death of her husband at any time during the year following his demise. As she did not so sue her action is barred by the statute of limitations. (Subd. 3, sec. 340, Code Civ. Proc.)"

The *Haro* case, *supra*, was subsequently cited and followed in *Caraway* v. *Burns*, 143 C. A. 2d 327, 299 P. 2d 689 (1956), in which the court said (pp. 328-329):

> "The point was decided against plaintiff's contention in *Haro* v. *Southern Pac. Co.* (1936), 17 Cal. App. 2d 594 [62 P. 2d 441], a wrongful death action by a widow, 19 years old when her husband died, instituted more than one year after his death but before she reached the age of 21. The court held that the phrase 'transaction respecting property' in Civil Code section 25 includes the bringing of an action for wrongful death, that she

> therefore was under no disability preventing her to bring the action at any time during the year following his death and that at the end of that year the action was barred by the statute (p. 597). The Supreme Court denied a hearing. Appellant's attacks on this decision and her contention that it has lost authority because of an amendment made in 1953 in section 25, *supra*, are without merit."

Thus, it is clear that a California court would read Section 25 of the Civil Code together with Section 352 of the Code of Civil Procedure in determining the period during which a married woman was "within the age of majority" for the purpose of tolling the statute of limitations.

Petitioners seek to avoid the operation of this rule, which they implicitly admit would be applicable if the widow were a resident of California, by urging that in determining the period of disability the California courts would look to the law of the widow's domicile, not to the law of California. In support of this argument they place great reliance upon the cases of *Emery* v. *Emery*, 45 C. 2d 421, 289 P. 2d 218 (1955), and *Deason* v. *Jones*, 7 C. A. 2d 482, 45 P. 2d 1025 (1935). However, as the courts below pointed out (R. 39, 47), the *Deason* case does not support their position, since the California court gave effect to its own statute on minority, even as to one who had previously acquired the rights of majority under the law of his domicile for the purpose of entering into contracts. Nor does the *Emery* case support the position advanced by petitioners, since the California court was quite explicit in delineating the limitations

of its holding. In the language emphasized by petitioners at page 13 of their brief, the court specifically stated that disabilities due to family relationship are more properly determined by reference to the law of the state of the family domicile. Whether or not this represents an exception to the general rule with respect to disabilities due to family relationship, it can hardly be argued that disabilities involving the statute of limitations would fall within the same category.

In support of their contention that California would give to a noncitizen an advantage it could not have extended to its own citizens, petitioners cite the case of *Bruton* v. *Villoria*, 138 C. A. 2d 642, 292 P. 2d 638 (1956). However, analysis of that case discloses that the court was merely applying its own law with respect to contributory negligence to a case where the husband had no interest in the wife's recovery for her own personal injuries. In order to apply that rule the court had to determine the ownership of the cause of action and followed its own conflict of laws rule of looking to the law of the domicile as controlling as to ownership of personalty. The same rule concerning contributory negligence would be applied to California residents and nonresidents alike if, due to other circumstances, the property interest of the other spouse has ceased.[2] Therefore, it is not correct to say that the California court was discriminating against its own citizens. It was applying a uniform rule of evidence and the need to look to the law of plaintiffs' domicile to determine ownership of personal property was governed by a well-settled con-

[2]Two such examples are when the marriage relationship ceases due to death or when the negligence occurred prior to marriage

flict of laws rule which has no relevance to the present case.

Contrasted with the California cases cited and relied upon by petitioners are the cases of *Smith* v. *Sheplar*, 8 C. A. 2d 717, 48 P. 2d 999 (1935), and *Bicwend* v. *Bicwend*, 17 C. 2d 108 (1941), which leave little doubt as to the law that the California courts would apply in the present case. In the *Smith* case, the appellate court stated (p. 720):

> "It is true as to procedure and pleading, the foreign plaintiff appearing in our courts must follow the California law. He is subject to the period of our statute of limitations regardless of the period of similar statutes in his jurisdiction. (*Royal Trust Co.* v. *MacBean*, 168 Cal. 642 [144 Pac. 139]), except as provided by section 361 of the Code of Civil Procedure."[3]

Similarly, in the *Bicwend* case, the California Supreme Court stated (p. 114):

> "It is a principle of conflict of laws recognized in California that the barring of a claim by the statute of limitations is a procedural matter governed by the law of the forum, regardless of where the cause of action arose. (*McElmoyle* v. *Cohen*, 38 U. S. [13 Pet.] 312, [10 L. Ed. 177]; *Townsend* v. *Jemison*, 50 U. S. [9 How.] 407 [13 L. Ed. 194]; *Royal Trust Co.* v. *MacBean*, 168 Cal. 642 [144 Pac. 139]; *Miller* v. *Lane*, 160 Cal. 90 [116 Pac. 58].)"

Section 25 of the California Civil Code defines in clear and unequivocal language the limits of minority

[3]Section 361 of the Code of Civil Procedure is the California "borrowing" statute of limitations

and specifically states that a female who contracts a lawful marriage and thereafter reaches the age of eighteen years "shall be of the age of majority" upon reaching the age of eighteen years. When the California legislature drafted the disability provision of Section 352 of the Code of Civil Procedure and set the period "within the age of majority" as the limiting time and then spelled out that period in the Civil Code, the only reasonable interpretation is that they were to be read together, as was obviously done in *Haro* v. *Southern Pac. R. R.*, *supra*, and *Caraway* v. *Burns*, *supra*. Indeed, the California courts have held that the provisions of the California codes must, as far as reasonably possible, be construed as though they were parts of the same statute. *Arques* v. *National Superior Co.*, 67 C. A. 2d 763, 155 P. 2d 643 (1945). It could not reasonably have been the intention of the California legislature to leave the interpretation of the word "majority" as used in Section 352 of the Code of Civil Procedure to the laws of the states of nonresidents attempting to enforce a California cause of action in a California court. Accordingly, the application of Section 25 of the Civil Code with the tolling provisions of Section 352 of the Code of Civil Procedure under the "accouterments" doctrine enunciated in *American Surety Company of New York* v. *Gainfort*, *supra*, is the only reasonable application of said doctrine.

B. Rule 17(b) of the Federal Rules of Civil Procedure has no bearing here since the question is not one of capacity but of possession of a cause of action.

It is difficult to perceive what bearing Rule 17(b) of the Federal Rules of Civil Procedure, which speaks of capacity to sue or be sued, has on the instant case. That rule can have no effect until an action is commenced in the federal court. There is no dispute here that the widow was over the age of twenty-one years and thus had "capacity to sue" under the law of South Carolina when this action was commenced.[4] The issue here has to do solely with the period during which a cause of action governed by the laws of California is to remain alive. Petitioners are confused between "legal capacity to sue" and possession of a "cause of action."[5] California alone gave the substantive and remedial rights which could have been exercised by decedent's widow within one year after reaching her eighteenth birthday, regardless of what her status may have been in South Carolina.

Moreover, in view of this Court's decision in *Guaranty Trust Co.* v. *York, supra,* it would seem abundantly clear that Rule 17(b) of the Federal Rules of Civil Procedure can have no application to the issues involved here. In that case, Mr. Justice Frankfurter, in delivering the majority opinion, pointed out that particular rules of local law "do not in the slightest change the crucial consideration that if a plea of the

[4]South Carolina Code, Volume 1, § 10-104(1).

[5]"The law recognizes 'capacity to sue' as the plaintiff's personal right to come into court, and his 'cause of action' as his right to relief under the facts of the case he brings." *Magee* v. *McNary,* 10 F. R. D. 5, 11 (W. D. Pa. 1950).

statute of limitations would bar recovery in a state court, a federal court ought not to afford recovery." 326 U. S. 99, 110.

In a somewhat analogous situation in *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530 (1949), this Court held that the Federal Rules of Civil Procedure could not in effect extend a state statute of limitations in a diversity case when that statute had run according to applicable state procedure, stating (pp. 533-534):

> "* * * Here, * * * there can be no doubt that the suit was properly commenced in the federal court. But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court [citing cases]. It accrues and comes to an end when local law so declares [citing cases]. Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co.* v. *Tompkins* is transgressed.
>
> We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without add-

ing something to the cause of action. We may not do that consistently with *Erie R. Co.* v. *Tompkins.*"

Here, as has been demonstrated in argument I-A, *supra*, California has held that the disability of being "within the age of majority" ceases when a lawfully married female reaches the age of eighteen years, and petitioners' repeated references to *Emery* v. *Emery*, *supra*, as a pronouncement by the highest court of California that the question of capacity to sue should be determined by the law of the party's domicile, do not alter the fact that the only disabilities involved in that case were those due to family relationship and not disabilities involving the statute of limitations.

II

The Courts below were clearly correct in following California cases which are squarely in point with respect to the claim of the infant daughter.

As petitioners point out at pages 22 and 23 of their brief, the California courts have expressly held that if a cause of action for wrongful death under Section 377 of the California Code of Civil Procedure is time-barred as to the widow, it is also barred as to her children.

In *Scars* v. *Majors*, 104 Cal. App. 60, 285 Pac. 321 (1930), the infant son was fifteen years of age at the time of his father's death and nineteen years of age when the action was commenced, both parties agreeing that the mother was barred by the statute of limitations. It was argued on behalf of the plaintiffs that

the infant's action was not barred by reason of the tolling of the statute of limitations on the ground of infancy, and it was further urged that if the cause of action was saved as to the infant, it was saved as to the mother. The court rejected this argument, stating (p. 62):

> "In reply, the defendants assert that a single joint cause of action is given to the heirs by section 377 of the Code of Civil Procedure, and that the language of the statute permits of no other construction. (Civ. Code, sec. 1431; Salmon v. Rathjens, 152 Cal. 290, 294 [92 Pac. 733].) Continuing, they claim that the action being barred as to all excepting the infant, that it was also barred as to him. We think the contention is well founded."

To the same effect is *Haro* v. *Southern Pac. R. R.*, 17 C. A. 2d 594, 62 P. 2d 441 (1936), *supra*, where the widow sought damages on behalf of herself and her minor children for the wrongful death of her husband. After determining that the widow had not been under any disability to bring the action within one year after the death, the court stated (p. 597):

> "As she did not so sue her action is barred by the statute of limitations. (Subd. 3, sec. 340, Code Civ. Pro.). As her cause of action is barred the causes of action of the other plaintiffs are also barred. (*Sears* v. *Majors*, *supra*.)"

A third holding of the California courts on the same point is *Gates* v. *Wendling Nathan Co.*, 27 C. A. 2d 307, 81 P. 2d 173 (1938), another action brought under the California wrongful death act more than a

year after the death, and in which the court stated (p. 315):

> "The further contention that the statute has not here run because one of the plaintiffs is a minor is squarely answered by the opinion of the court in *Haro* v. *Southern Pac. R. R. Co.*, 17 Cal. App. (2d) 594, 595 [62 Pac. (2d) 441], following *Sears* v. *Majors*, 104 Cal. App. 60 [285 Pac. 321]."

Petitioners, while admitting that the first two cases, above mentioned, are squarely in point, attempt to defeat their applicability to the facts in the case at bar by referring to a line of cases, none of which involve the statute of limitations, which they contend cast doubt upon the course which would be followed by a California court today, to wit: *Bowler* v. *Ross*, 213 Cal. 484, 2 P. 2d 817 (1931); *Bowen* v. *Kizirian*, 105 Cal. App. 286, 287 Pac 570 (1930); *Flores* v. *Brown*, 39 C. 2d 622, 248 P. 2d 922 (1952); and *Perkins* v. *Robertson*, 140 C. A. 2d 536, 295 P. 2d 972 (1956).

Petitioners argue that since the court in the *Bowler* case (holding that the contributory negligence of one heir did not bar the remaining heirs) adopted the reasoning of the *Bowen* case, which was decided by a different appellate court than that which decided the *Sears* case, the holding of the *Sears* case is to be considered an anomaly. However, petitioners fail to point out that it was the same appellate court which decided *Bowen* in 1930 that decided the *Haro* case, *supra*, in 1936, and the *Gates* case in 1938, which expressly followed the holding in both *Sears* and *Haro*. In neither *Haro* nor *Gates* did that appellate court mention its holding in *Bowen*, and apparently it saw

no conflict between the two lines of cases. Moreover, the mere fact that *Bowen* and *Bowler* were cited with approval by the California Supreme Court with respect to contributory negligence in *Flores* v. *Brown*, *supra*, is no indication that that court saw any such conflict, nor does the language quoted by petitioners at page 24 of their brief from *Perkins* v. *Robertson*, *supra*, indicate any conflict. On the contrary, the *Perkins* case not only did not attempt to change the rule laid down in the *Sears*, *Haro* and *Gates* cases, but it affirmatively concurred that the cause of action created by Section 377 of the California Code of Civil Procedure "is a joint one, a single one and an indivisible one." 140 C. A. 2d 536, 542.

Petitioners also argue that the lower courts failed to follow the mandate set down by this Court in *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223 (1940), by failing to state whether the two lines of cases were logically reconcilable. However, neither the *West* case nor any other pronouncement of this Court requires the lower courts to attempt such reconciliation when, as here, they followed the "California decisions that are directly in point" rather than "other decisions of courts of the same level that are alleged to be inconsistent with but in no way reflect on the pertinent authorities" (R. 50).

III

No privileges and immunities of petitioners have been violated since they were given reasonable and adequate access to the courts of New York.

Petitioner's contention that the construction given to Section 13 of the New York Civil Practice Act by the courts below, violates the privileges and immunities clause of the Constitution of the United States is not valid. The constitutionality of Section 13 (then 390a of the Code of Civil Procedure) was upheld in *Klotz* v. *Angle*, 220 N. Y. 347, 116 N. E. 24 (1917), where the Court of Appeals considered the question of the discrimination of the statute against a nonresident and held that such discrimination was not unconstitutional. Certainly, Section 13 gives the petitioners no less a right than they would have had had the action been brought in California rather than in New York.

This Court has said that in dealing with matters of local policy it will be slow to depart from local judgment in the absence of clear and compelling evidence of unconstitutionality. *Clyde* v. *Gilchrist*, 262 U. S. 94 (1923); *Atlantic Coast Line R. R.* v. *Phillips*, 332 U. S. 168 (1947).

The constitutionality of a Minnesota statute substantially similar to Section 13 of the New York Civil Practice Act was upheld by this Court in *Canadian Northern Ry.* v. *Eggen*, 252 U. S. 553 (1920). In that case, it was stated that the "privileges and immunities" clause of the Constitution, Article IV, §2, is satisfied (p. 562):

"[I]f the non-resident is given access to the courts

> of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."

Here, the widow could have enforced any rights she may have had under California law in the courts of New York at any time following her husband's death and prior to her nineteenth birthday by a guardian *ad litem;* New York Civil Practice Act, Sections 201-206. Thus, for a period of more than two and one-half years from the time her cause of action accrued, the widow was given all the rights she would have had as a resident of New York, including the right of access to the New York courts by a guardian *ad litem.*

Petitioners do not contend that the period of time during which the New York courts were available to them was unreasonable. Rather, they argue that it was unreasonable to require them to institute their suit through a guardian ad litem, as provided for in Section 236 of the New York Civil Practice Act. However, in *Vance* v. *Vance,* 108 U. S. 514 (1883) this Court held that there was no inherent right in an individual to have a statute of limitations tolled during infancy.

The discrimination which results from Section 13 of the New York Civil Practice Act is not due to a policy of "creating an arbitrary or vexatious discrimination" against non-residents of New York, a policy consideration which this Court found important in *Canadian Northern Ry* v. *Eggen,* 252 U. S. 553, *supra.* The statute is an attempt by New York

to prevent "forum shopping" whereby a litigant who has failed to prosecute his rights within the period prescribed by the statute of limitations where the cause of action arose searches out other jurisdictions where more favorable treatment is available. This Court recognized the evil of forum shopping in *Erie R. R.* v. *Tompkins, supra.*

The policy considerations which the legislature of New York found compelling in passing a statute which closed the courts of New York to non-residents who failed to prosecute their action within the time specified by the jurisdiction which created the cause of action should not be ignored in this instance.

On the other hand it is respectfully submitted that if the exception accorded by Section 13 of the New York Civil Practice Act to New York residents were to be declared unconstitutional it would not benefit petitioners but would only deprive New York residents of future benefits of the exception.

CONCLUSION

The summary judgment dismissing the complaint was properly granted in the case at bar and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1960.

Robert F. Nolan, Administrator, et al., Petitioners, v. Transocean Air Lines.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February 20, 1961.]

Per Curiam.

This action was brought in the United States District Court for the Southern District of New York to recover damages for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane operated by defendant-respondent Transocean Air Lines. Plaintiffs, petitioners here, are the decedent's South Carolina-appointed administrator, decedent's widow, and decedent's minor child, who sues through the widow, her mother, appointed her guardian *ad litem* by the District Court. Federal jurisdiction was predicated solely on diversity of citizenship—the administrator being a New York resident, the widow and child South Carolina residents, the airline a California corporation with its principal place of business in California—and the substantive basis of the claim was California's wrongful death Statute, Cal. Code Civ. Proc. § 377, made applicable by the New York choice-of-law rules, see *Baldwin* v. *Powell*, 294 N. Y. 130, 61 N. E. 2d 412, which govern this diversity action. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487. The defendant, by its answer, set up the Statute of Limitations, and subsequently moved for summary judgment on the ground that the action was time-barred. Enforcing the one-year limitations period deemed controlling under Cal. Code Civ. Proc. § 340, brought into operation by New York's "borrowing stat-

ute," N. Y. Civ. Prac. Act § 13, the District Court held that the statute had run as to the widow, and hence that the child and the administrator were also barred under the California doctrine announced by California District Courts of Appeal in *Sears* v. *Majors*, 104 Cal. App. 60, 285 Pac. 321, and *Haro* v. *Southern P. R. Co.*, 17 Cal. App. 2d 594, 62 P. 2d 441; that where one beneficiary of a wrongful death claim is time-barred, all beneficiaries are time-barred, the cause of action being "joint." 173 F. Supp. 114. There was no decision on this precise point by the Supreme Court of California; that court had left *Sears* and *Haro* undisturbed. See also *Gates* v. *Wendling Nathan Co.*, 27 Cal. App. 2d 307, 81 P. 2d 173; *Glavich* v. *Industrial Accident Comm'n*, 44 Cal. App. 2d 517, 112 P. 2d 774 (dictum). The District Court's order granting the motion for summary judgment was affirmed by the Court of Appeals for the Second Circuit. 276 F. 2d 280. We granted certiorari. 363 U. S. 836.

The writ brought here several points decided adversely to petitioners below. We need discuss only one issue, for its determination disposes of the case. The *Sears* and *Haro* cases, regarded by the District Court and the Court of Appeals as controlling, the effect upon a claim for wrongful death of the running of the Statute of Limitations upon one but not upon another of the decedent's heirs (the latter being under a limitations-tolling disability), were decided in 1930 and 1936, respectively, and *Gates* in 1938, by California District Courts of Appeal. In December 1959, the Supreme Court of California, in bank, decided *Leeper* v. *Beltrami*, 53 Cal. 2d 195, 347 P. 2d 12, which, in considered dictum construing Cal. Code Civ. Proc. § 352, stated: "If the cause of action were a joint one, the statute would be tolled as to both. 'If an action not severable is not barred as to one of the parties on account of his infancy at the time the cause of action

arose, it is not barred as to either of the other parties.'" *Id.*, at 208–209, 347 P. 2d, at 22.

This case was handed down after the District Court's ruling granting summary judgment for respondent in the present litigation, and only shortly before argument in the Court of Appeals. It was not brought to the attention of, and was not considered by, the Second Circuit. Inasmuch as the view expressed therein by the highest court of California may be decisive of an issue critical to petitioners' claim, and inasmuch as the Court of Appeals for the Second Circuit is charged with mandatory appellate review in the present case, that court should decide what relative weights, as authoritative sources for ascertaining California law, the New York Court of Appeals would accord to the *Sears-Haro* line (direct holdings of District Courts of Appeal between 1930 and 1938) and to *Leeper* (a considered, relevant dictum of general scope by the California Supreme Court in 1959). We set aside the judgment of the Court of Appeals and remand to that court for reconsideration of the case in light of the new factor introduced by *Leeper* v. *Beltrami*, *supra*.

So ordered.